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No. 92-1292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

v.

ACUFF-ROSE MUSIC, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE CAPITOL STEPS PRODUCTIONS, INC. AND MARK RUSSELL IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of this Honorable Court, Capitol Steps Products, Inc. ("The Capitol Steps") and Mark Russell move for leave to submit briefs as *amici curiae* in support of the Petitioner in this matter. Their brief in support of the Petition for a Writ of Certiorari focuses on the effect which the Sixth Circuit's holding in this case will have on the art of musical parody, and provides information not contained in the Petitioner's brief regarding the significance of musical parody to the nation. Because both Mr. Russell and The Capitol Steps are, as more fully described below, directly engaged in the busi-

ness of musical parody, they will be directly and personally affected by the Court's decision in this case. Both of them participated as *amici curiae* in proceedings before the Court of Appeals for the Sixth Circuit in this matter. The Petitioner has granted permission for the filing of this brief, which consent is on file, but the Respondent has refused permission.

STATEMENT OF INTEREST

Your *amici curiae* have a significant interest in the outcome of this case. The Capitol Steps have been performing, in Washintgon, D.C. and nationally, for eleven years. Declaration of William A. Strauss, hereinafter "Strauss Dec.," attached to the brief as Appendix A, at ¶¶ 1-2. A Capitol Steps performance consists primarily of song parodies, principally of copyrighted songs. The parodies, which generally have a high current political content, range in length from a few bars to an entire parody rendition. Recent examples keyed to the Presidential campaign were "I Wanna Be Your Pander Bear," and "I've Taken Stands on Both Sides Now," satirical jabs at President Clinton and former President Bush, respectively. Strauss Dec. ¶ 3.

Mark Russell has been performing parody in the Washington, D.C. area and nationally for nearly 40 years. He regularly appears on national network radio and television. For the past 18 years, he has hosted his own "Mark Russell Comedy Specials" on public television. Declaration of Alison K. Russell, hereinafter "Russell Dec.," attached to the brief as Appendix B, at ¶¶ 2-3. Along with spoken material, Mark Russell performs song parodies to both copyrighted and original melodies. One of his recent parodies of a copyrighted work is "We're Just Wild About Harry" to the tune of "I'm Just Wild About Harry," a satirical look at how both President Clinton and former President Bush invoked the name of Harry Truman during the campaign. Russell Dec. ¶ 5.

Neither The Capitol Steps nor Mark Russell seek or obtain licenses from copyright owners for their song parodies. They take this position for several reasons: First, both have been advised that their parodies of copyrighted songs constitute a "fair use" of the copyrighted materials. Strauss Dec. ¶ 4; Russell Dec. ¶ 6. Second, the very nature of social and political satire makes it impossible to obtain timely permission. Both perform topical political satire based on current political events; the process of asking for and receiving permission would make it impossible for them to perform the kind of current repertoire which their audiences have come to expect. Russell Dec. ¶ 7; Strauss Dec. ¶ 8.

Finally, asking permission would also be interpreted by music publishers as a request for an endorsement of the political ideas contained within the lyrics. Since the political views contained within a sing are solely those of the parodist, no endorsement is needed or wanted. Obviously, there may be copyright holders who do not endorse the political views expressed in a specific Mark Russell or Capitol Steps song parody. Moreover, many copyrights are owned by large corporations with extensive interests and involvement in the national political process. These corporations are generally reluctant to appear to endorse a song which embarrasses the current administration, or a powerful Senator or Member of Congress. A requirement that political parodists obtain, or attempt to obtain permission before signing or recording a particular song would make it nearly impossible to perform political song parody. Russell Dec. ¶¶ 6-8; Strauss Dec. ¶¶ 6-8; Strauss Dec. ¶¶ 4-7.

In view of the above facts, the interest of *amici* in the pending proceeding is clear: if it is unlawful for 2 Live Crew to sing the song parody "Pretty Woman" except with the permission of the copyright owners to the underlying work, then it may be unlawful for the Capitol Steps to sing "I've Taken Stands on Both Sides Now" without permission from the copyright owner of "I've Looked at

Life from Both Sides Now," or for Mark Russell to sing "We're Just Wild About Harry" without permission from the copyright owner of "I'm Just Wild About Harry." In fact, under the ruling of the Court below, it would be effectively impossible for the *amici* or any of the other hundreds of well known and less well known parodists operating in the musical genre to perform at all, thereby impoverishing the world of both music and political discourse. Accordingly, *amici* have a strong and direct interest in the granting of this Petition for a Writ of Certiorari.

Respectfully submitted,

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BRIEF OF CAPITOL STEPS PRODUCTIONS, INC. AND MARK RUSSELL AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Capitol Steps and Mark Russell submit this brief as *amici curiae*, and respectfully suggest that this Court grant the Petition, and reverse the decision below.

STATEMENT OF INTEREST

The Statement of Interest is included in the Motion for Leave to File Brief Amici Curiae in Support of Petitioner, *ante*.

SUMMARY OF ARGUMENT

To prevent copyright protection of intellectual property from becoming a straightjacket, courts and the Congress have developed the doctrine of "fair use," which provides that copyrighted material may be quoted or copied verbatim under certain conditions. "Fair use" status has regularly been granted to those who quote from copyrighted works to explain or critique them, and to those who parody copyrighted works.

The song parodist routinely appropriates more of a work than other beneficiaries of the fair use doctrine. Anyone is free to record a copyrighted song by paying the statutory mechanical copyright fee. But the parodist who, by definition, modifies the lyric (and sometimes the tune) to make his point cannot qualify for the compulsory license provided by Section 115 of the Copyright Act, 17 U.S.C. § 115.[1] Thus, unless the parody is treated as a "fair use," the parodist must obtain permission from the copyright owner. Such permission is rarely granted.

A line of decisions in the Second and Ninth Circuits—home to major entertainment centers—have found parodies to be "fair use." *See, e.g., Elsmere Music, Inc. v. Nat'l Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y.), *aff'd* 623 F.2d 252 (2d Cir. 1980); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d Cir. 1964). These Second and Ninth Circuit opinions have for many years constituted the "bill of rights" for song parodists.

The "fair use" doctrine is now codified at 17 U.S.C. § 107, which provides in relevant part that:

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[1] Section 115 provides for the so-called "mechanical license," which allows anyone to make a copy of a phonorecord, subject only to the requirement that pre-set royalties be paid. The right to use Section 115 is limited; while "arrangements" are allowed, "the arrangement may not change the basic melody or fundamental character of the work." 11 U.S.C. § 115(a)(2).

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes:
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

In this case, the Sixth Circuit has found that a song parody did not constitute fair use. It made this determination almost entirely on the basis of a finding that the parody was recorded for a "commercial" purpose. The test applied by the Sixth Circuit effectively rendered the four factor test embodied in the statute moot by holding that the "commercial" nature of the parody was dispositive. In particular, the Court below impermissibly established an irrebuttable presumption that the "commercial" purpose of a parody mandated a finding that the parody caused economic harm to the copyright holder.

This emphasis on "comercial" purpose disregards the statutory language, and renders the statutory balancing tests meaningless. The new test applied by the Sixth Circuit would bring an end to musical political parody as it has existed since the time of the Revolution, and allows censorship by copyright of protected speech.

ARGUMENT

I. THE SIXTH CIRCUIT'S INTERPRETATION OF THE FAIR USE STATUTORY FACTORS IS AT ODDS WITH THE SETTLED LAW REGARDING PARODIES, PARTICULARLY AS THAT LAW HAS BEEN TRADITIONALLY FORMULATED IN THE SECOND AND NINTH CIRCUITS.

In any fair use case involving an asserted parody, the first question is whether the song or other work in question is a parody at all. Here the Sixth Circuit answered that question in the affirmative, as did the District Court. Petition App. A at 10a; Petition App. B at 42a. Accordingly, those cases in which courts have found that parody (or another form of fair use) did not exist, including *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); and *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied sub nom., O'Neill v. Walt Disney Productions*, 439 U.S. 1132 (1979), are inapposite to this case. Instead, the Court was required to examine the statutory fair use factors set forth at 17 U.S.C. § 107, and such other factors as it found relevant, to determine whether the parody by 2 Live Crew of Acuff-Roe's song was "fair." This the Court did; however, at least in applying the first, third, and fourth factors, it established tests which are both impossible to meet for any commercial song parody, and squarely at odds with those factors as enunciated by the Second and Ninth Circuits.

The analysis used by the Sixth Circuit, particularly with respect to the first and fourth statutory fair use factors, would mandate a finding of no fair use for any commercial parody, not just 2 Live Crew's parody of "Pretty Woman."

A. The Sixth Circuit Erred in Finding That the Commercial Nature of a Parody Was Dispositive of the First Statutory Fair Use Factor.

The first of the four fair use factors is:

> (1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes. . . .

Both the majority and the dissent in this case concluded that the purpose of the 2 Live Crew song "Pretty Woman" was parody, and that its character was commercial. Petition App. A. at 10a-12a and App. B. at 40a-42a. The difference between them lies in whether the fact of commercial use was treated as dispositive for purposes of utilizing this factor: the majority held that once a commercial use was found, the status of the work as parody was irrelevant;[2] the dissent held that commercial use, *per se*, did not determine whether this fair use factor was present or absent.

Traditionally, real song parodies, nearly all of which are done in part for a commercial purpose, are accorded no less respect for that reason than hypothetical, noncommercial parodies. Indeed, the cases governing parody as a fair use *all* involve commercial parodies. *See, e.g., Elsmere* (parody by commercial television network found to be fair use); *Fisher* (parody by commercial radio station personality found to be fair use); and *Berlin* (parody by commercial magazine found to be fair use). These decisions by the Second and Ninth Circuits have uniformly held that the commercial nature of the parody, by itself, would not act to bar the fair use defense.

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[2] While the Court below discussed balancing purpose and character, it found "that the admittedly commercial nature of the derivative work—the *purpose* of the work being no less important than its *character* in the Act's formulation—requires the conclusion that the first factor weighs against a finding of fair use." Petition App. A at 13a. (Emphasis in original).

The Sixth Circuit's holding below rejects this long-standing treatment of parody as fair use, and establishes what amounts to a bright line test—if a parody is produced for a commercial purpose, it is not a fair use. Had Congress intended the result reached by the majority, it could have simply written the first factor as "whether such use is of commercial nature or is for nonprofit educational purposes." It did not do so.

In formulating the statutory fair use doctrine contained in 17 U.S.C. § 107, Congress appears to have focused on the degree to which copyrighted works could be mechanically or electronically copied and used without payment of royalties. Much of the discussion centered on whether a schoolteacher could copy portions of a book for use by her class. The dependent clause referencing the commercial or non-profit nature of a use was added largely to expand "fair use" to this area, not to limit the prior scope of fair use treatment:

> The Committee has amended the first of the criteria to be considered—"the purpose and character of the use"—to state explicitly that this factor includes a consideration "whether such use is of a commercial nature or is for non-profit educational purposes." This amendment is not intended to be interpreted as any sort of not-for-profit limitation on educational uses of copyrighted works. It is an expressd recognition that, as under the present law, the commercial of non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighted along with other factors in fair use decisions.

Committee on the Judiciary, House Report No. 1476, 94th Cong., 2d Sess. 66 (1976).

In reaching its unprecedented decision to afford controlling weight to the commercial character of a parody, the majority opinion relied heavily on *Harper & Row Pubishers v. Nation Enterprises*, 471 U.S. 539 (1985).

Yet nothing in this Court's decision in that case compels, or even suggests, an intent to overturn prior law on this point.

The Court weighed three factors in *Harper & Row* to determine the nature and character of the challenged use: the fact that the challenged use entailed news reporting; the fact that *The Nation* was a commercial magazine; and the fact that it had "the *intended purpose* of supplanting the copyright holder's valuable right of first publication." *Id.* at 562. (Emphasis in original.) It was clearly this last fact, and not the second, which tilted this Court's decision on the first fair use factor toward Harper & Row: "In evaluating character and purpose we cannot ignore *The Nation*'s stated purpose of scooping the forthcoming hardcover and *Time* abstracts." *Id.* By contrast, in this case, no such intention to supplant or "scoop" the original melody of "Oh, Pretty Woman" has been found on the record of this case, or has even been alleged.

B. The Sixth Circuit Misapplied the Substantiality Test as It Pertains to Song Parodies.

The third statutory factor is:

> (3) the amount and substantiality of the portion used in relation to the copyrighted work a as whole. . . .

The use of this statutory factor in the case of parody is, as the dissent has recognized, "problamatical." Petition App. A at 29a. A parody, by its nature, must "conjure up" a sufficient portion of the copyrighted work to be recognizable as parody.

In the specific case of song parodies, the Second Circuit has endorsed a view of the "substantiality" factor which differs markedly from the restrictive view of the majority opinion in this case:

> [T]he concept of "conjuring up" an original came into the copyright law not as a limitation on how

> much of an original may be used, but as a recognition that a parody frequently needs to be more than a fleeting evocation of an original in order to make its humorous point. *Columbus Pictures Corp. v. National Broadcasting Co.*, 137 F. Supp. 348 (S.D. Cal. 1955). A parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect.

Elsmere Music, 623 F.2d at 253 n.1. Similarly, the Ninth Circuit has recognized a "special need for accuracy," in song parodies, where a change of a few notes can make the melody unrecognizable, and destroy the intended musical joke. *Fisher v. Dees*, 794 F. 2d at 439.

The majority opinion simply makes no sense when applied to a song parody. While it gives lip service to the above quotation from *Elsmere*, it also holds that the use of a substantial portion of a copyrighted work is evidence against fair use, and further that:

> The qualitative degree of the copying is even more critical than the quantitative, and we ask what degree of the essence of the original is copied in relation to its whole. [Citation omitted] We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original.

Petition App. A at 15a-16a.

The difficulty with this formulation is that every song has a recognizable tune. That time constitutes its true "heart" or "essence." It is impossible to parody the song without musically quoting its tune. On the other hand, according to the majority opinion, once one does quote this "heart," one loses (or at least does not win) on this factor of the fair use test. It appears that such a formulation would cut the "heart" out of the fair use doctrine,

insofar as parody is concerned, and once again places the Sixth Circuit's formulation of the law squarely at odds with that enunciated by the Second and Ninth Circuits.

C. The Sixth Circuit Erred in Its Evaluation of the Fourth Statutory Fair Use Factor by Creating an Irrebuttable Presumption That a Commercial Parody Will Harm the Copyrighted Work.

The fourth statutory factor is:

> (4) the effect of the use upon the potential market for or the value of the copyrighted work.

This Court has called this forth factor "undoubtedly the single most important element of fair use." *Harper & Row*, 471 U.S. at 566. Despite the importance of this factor, the copyright holders presented no evidence that the petitioners' parody had any effect on the market for their copyrighted work.[3] But the Court below determined that there was no need for evidence. Having found that 2 Live Crew's use of the copyrighted work was "wholly commercial," the Court "presume[d] that a likelihood of future harm to Acuff-Rose exists." Petition App. A at 16a.

In reaching this rather startling presumption, the majority opinion relied upon *Harper & Row*. However, an evidentiary presumption, such as that created by this Court in *Harper & Row*, has only a limited effect. Under Fed. R. Evid. 301, "a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense

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[3] On the other hand, 2 Live Crew presented evidence that their parody did not constitute either a present or future danger to sales of "Oh, Pretty Woman." Petitioners made this showing through the unrebutted affidavits of Oscar Brand and M. William Krasilovsky, which are attached as Appendices to the Petition. Both experts testified that the potential customers for the 2 Live Crew parody and the original Acuff-Rose song are entirely different and distinct.

of the risk of nonpersuasion, which remains throughout the trial on the party on whom it was originally cast." The federal courts, through Rule 301, have adopted the "bursting bubble" approach to presumptions, under which the presumption vanishes, and has no further probative effect, once it has been rebutted. 10 J. Moore & H. Bendix, *Moore's Federal Practice* § 301.04[4.-1] (2d ed. 1988).

This Court found its "commercial use" presumption to be rebuttable in the very case in which it created that presumption. In *Sony Corp. v. Universal City Studios*, 464 U.S. 416, 104 S. Ct. 774 (1984), the Court first said that, "every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege which belongs to the owners of the copyright." 464 U.S. at 451. The Court, however, went on to hold that the presumption had been rebutted by the respondents, through evidence showing that their commercial video technology had uses which would not unfairly exploit this privilege. The "commercial use" presumption of *Sony* and *Harper & Row* was not intended to, nor did it, overrule *sotto voce* the traditional fair use protection afforded commercial song parodies.

When the Court of Appeals reversed the District Court on this issue, it effectively declared the existence of an irrebuttable presumption that commercial use must always result in injury to the market for the copyrighted work.[4] This had the effect of collapsing yet another of the

[4] In fact, the other case principally relied upon by the majority below, *Rogers v. Koons*, 960 F.2d 301, 312 (2d Cir. 1992), reached a contrary conclusion. In that case, the Second Circuit expressly recognized that the nature of the intended audience of even a direct copy of a work could require that it be treated as a fair use. According to the Court, "fair use permits lyrics or music to be copied in a literary magazine, but where the same material is published in a song sheet magazine, purchased for playing and not simply for reading, it is an unfair use." 960 F.2d at 312. This distinction is similar to the conclusion reached by the Petitioners' expert, Oscar Brand, who concluded that the 2 Live Crew parody was intended for an entirely different audience than the original work, and could not "affect the sales or popularity of the Orbison song, except to stimulate interest in the original." Petition App. D at ¶ 19.

four factors into a simple statement that commercial benefit is inconsistent with fair use.[5] Had Congress intended this simple and simplistic result, it could have simply stated so.

D. The Argument That a Parody Interferes With the Right of a Copyright Owner to Profit From Its Own Parodies Is Without Merit.

A crucial link in the reasoning of the Sixth Circuit that parodies must always cause economic harm to a copyright owners was its argument that the 2 Live Crew parody would impair the market for parodies by the copyright holder. The core of the Circuit Court's reasoning on this issue was its argument that 1) copyright owners have rights in derivative works as well as the original work; and 2) parodies are derivative works; therefore 3) copyright owners have rights in parodies of their own work which will be injured by the issuance of unlicensed parodies. Petition App. A at 17a.

However, the second element of this syllogism is false; parodies are, under section 107, not derivative works, but rather "comment" and "criticism" on a work. The weak-

[5] The Court below actually linked the first and fourth factors and decided them both on the basis of the presumption. When discussing the first factor, the Court implied the existence of a factual test which it later resolved by the presumption of harm:

> Therefore, in analyzing the purpose and character of 2 Live Crew's use of the copyrighted song, the facts in the record require that we start from the position that the use is unfair. We are asked then to consider whether 2 Live Crew met its burden to rebut the presumption by a defense, we note, requiring the court to be convinced that the "parody does not unfairly diminish the economic value of the original."

Petition App. A at 13a.

ness of the Court's formulation can be seen if one substitutes musical or theatrical criticism for parody. Assume that the *New York Times* writes a criticism of a copyrighted play. Clearly, this criticism is prepared and published for commercial purposes, *i.e.*, to sell newspapers and newspaper advertising. Could it then be said that the *Times* review was a copyright infringement because it unfairly interfered with the author's right to criticize his own work? This would truly be a remarkable result; yet it seems to be the result mandated by the majority's opinion.

Of course, a different issue would arise if a reviewer or parodist simply intended to appropriate the original work, and this distinction was expressly adopted in *Harper & Row*:

> As early as 1841, Justice Story gave judicial recognition to the [fair use] doctrine in a case that concerned the letters of another former President, George Washington.
>
> > "[A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticize, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy." *Folsom v. Marsh*, 9 F. Cas. 342, 344-345 (No. 4,901) (CC Mass.)

Harper & Row, 471 U.S. at 550. But this issue does not arise here, since the majority opinion of the Court below has already determined 2 Live Crew's intent to be parody, not piracy. Petition App. A at 10a.

In summary, a consideration of the statutory factors with an eye to the nature of parody leads inexorably to the conclusion that the parody in question was a fair use. The Sixth Circuit's contrary conclusion is insupportable on this record.

II. THE FORMULATION OF FAIR USE ADOPTED BY THE SIXTH CIRCUIT WOULD MAKE POLITICAL SONG PARODY DANGEROUS OR IMPOSSIBLE.

As the dissent in the Court below pointed out, there may be factors not listed in the statutory schema which "merit consideration by the courts in determining when parody constitutes fair use." Petition App. A at 33a. One such factor is that the Sixth Circuit's decision may, for all practical purposes, make the art of song parody impossible—or, at a minimum, very risky. For the reasons set forth in the Statement of Interest, it is virtually impossible to perform topical, political song parodies if one seeks permission for the use of copyrighted works. *See* Strauss Dec. ¶ 7; Russell Dec. ¶¶ 6-9. As Professor Nimmer has stated, a satire of a copyrighted song, "by its very nature is unlikely to be the subject of a license from the author of a serious work. Only by the recogniiton of a fair use defense is society likely to reap the benefit of this socially useful literary genre." 3 *Nimmer on Copyright* § 13.05[C] (1992). The instant case highlights this perceptive conclusion; here a license was requested—the Petitioners offered to pay statutory royalties —yet the request was refused.

It is also a fact, of which this Court may take note, that all song parodies—like all songs—that attain popular currency have some commercial aspect. Today, scores of companies, groups, and individuals write, perform, and record political parody songs of copyrighted material, relying on the fair use doctrine for their protection from claims of copyright infringement. *See* Petition at 20. Whenever the song gains more than a purely local audience, these parodies are presented in part for commercial purposes. They are played on commercial radio stations, broadcast on commercial television networks, performed at concerts for which admission is charged, or recorded on tapes or discs which are sold to the public. There is simply no other route into the popular culture than

through the marketplace; even were the parodists themselves to perform the work *gratis*, the act of transmitting this source of political discourse to the public is necessarily suffused with commercialism.

Yet the Sixth Circuit's opinion appears to say that anyone performing or recording song parodies for money must first seek permission. Such a result would destroy an art form which has existed longer than the nation.

Filed herewith as Exhibit 1 to Appendix C is a recent Capitol Steps recording, "From Yankee Doodle to Pander Bear," in which the group traces the art of song parody throughout American history.[6] As musically depicted in this Exhibit, song parodies have been a staple of American political life since the nation's beginnings, and have been used by union organizers, war resisters, war supporters, abolitionists, suffragettes, Whigs, Democrats, Republicans, and many others to express their views on the politics of the day. "Yankee Doodle," the "Star Spangled Banner," and "The Battle Hymn of the Republic" all began as song parodies—a placing of new and controversial words to a then popular song.

The political song is not merely a musical confection; it is, in the words of I.W.W. songwriter and activist Joe Hill, an unsurpassed instrument of political dialogue and organization:

> A pamphlet, no matter how good, is never read more than once, but a song is learned by heart and repeated over and over; and I maintain that if a person can put a few cold, common sense facts into a song and dress them up in a cloak of humor to take the dryness off them, he will succeed in reaching a great number of workers who are too unintelligent or too indifferent to read a pamphlet or an editorial on economic science.

Letter from Joe Hill to *Solidarity* (Dec. 12, 1914), *cited in* G. Smith, *Joe Hill* 19 (1969). Professor Smith noted that:

[6] Copies of this Exhibit have been lodged with the Court.

> Joe Hill, parodist and songsmith, was translator and scribe for the migrant workers and hobos of America, turning into lyrical expression their everday experience of disillusionment, hardship, bitterness, and injustice. His lyrics, for the most part, are tough, hard-bitten and scornful. . . . Hill wrote the music for his lyrics in only a few instances, usually setting his words to popular tunes of the time.

Id. at 15-16.[7]

At the other end of the political spectrum, the *Wall Street Journal* has called political song parody, "a time-honored tradition . . . Americans are the kind of people who appreciate this kind of thing." Wall Street Journal, Sept. 5, 1990 at A14, col. 3. The article discusses numerous song parodies related to the Gulf War (such as "Bomb, Bomb, Bomb . . . Bomb Bomb Iraq") which were recorded and played by disc jockeys on commercial radio stations.

In modern America, political song parodists continue to serve the same purpose historian Vera Brodsky Lawrence ascribed to them during the Civil War:

> People on both sides of the battle lines placed great reliance on the songs, finding in them a source of strength, courage. hope, much-needed laughter, and a general escape valve for the unbearable tensions of their lives. . . .

V. Lawrence, *Music for Patriots, Politicians, and Presidents* 341 (1975).

Denying parodists the protection of the fair use provision of the copyright law could force them either to cease doing what they do, or to continue performing and recording, while seeking the protection of the First Amendment. The former course would musically impoverish the nation; the latter would produce unnecessary constitu-

[7] Excerpts from Joe Hill songs are contained in "From Yankee Doodle to Pander Bear," the tape filed as Exhibit 1 to Appendix C.

tional litigation, the threat of which would no doubt deter many a would-be parodist.

2 Live Crew and the *amici* undoubtedly purvey strikingly different versions of satire and parody. But legal interpretations which may seem viable when aimed at unconventional or peripheral behavior must be evaluated in light of their potential impact on behavior which is at the heart of the zone of protected political discourse. However offensive the lyrics of "Pretty Woman" may strike some, it is not possible to subject them to censorship by copyright without imperiling a vibrant source of political speech which has flourished since the founding of the Republic.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Petition for a Writ of Certiroari, this Court should grant the Petition, and reverse the judgment of the Court of Appeals in this matter.

Respectfully submitted,

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Counsel for Capitol Steps Production, Inc. and Mark Russell

Dated: February 24, 1993

* Counsel of Record

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Cincinnati, Ohio

Case No. 91-6225

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant
v.

LUTHER R. CAMPBELL, *et al.*,
Defendants-Appellees

On appeal from a decision of the United States
District Court for the Middle District of Tennessee

DECLARATION OF WILLIAM A. STRAUSS

1. My name is William A. Strauss. I am an officer and Director of Capitol Steps Productions, Inc., a Virginia corporation, and the paid, full time artistic director and co-lyricist for "The Capitol Steps," the company's musical and theatrical troupe. I have been with the troupe since its inception at a Christmas party in the U.S. Senate, and have been a director and officer of the corporation since its formation. I am also an attorney and a member of the Bar of the District of Columbia.

2. The Capitol Steps have been performing in the Washington, D.C. area and nationally for eleven years. The troupe regularly performs on national network radio and television, including on such shows as "All Things

Considered," "Nightline" and "Good Morning America," and at live shows around the country, including in the states of the Sixth Circuit. The Capitol Steps produce and sell recordings of their songs and live performances. The troupe has performed for, and at the invitation of President Reagan and President Bush (five times). We have also performed for Governor Clinton, Senator Gore, judicial conferences, and probably three quarters of all current Members of Congress.

3. A Capitol Steps performance consists primarily of song parodies, principally of copyrighted songs. The parodies, which generally have a high current political content, range in length from a few bars to an entire parody rendition. Recent examples are "I Wanna Be Your Pander Bear," and "I've Taken Stands on Both Sides Now," which are satirical jabs at Governor Clinton and President Bush, respectively. Song parodies are an integral part of musical political satire because they provide musical hooks, puns and other cultural reference points that add to the humor while making it easier for audiences to grasp (and remember) the political messages. Many educators have told us of the usefulness of our song parodies in high schools and college civics classes. Government officials have frequently brought visiting foreign officials to the group's shows as a jovial way of demonstrating the role of free speech in the American political process. Before the Soviet collapse, Capitol Steps songs were broadcast throughout the world on the Voice of America.

4. The Capitol Steps do not seek or obtain licenses from copyright owners for two reasons. First, we have been advised by counsel that our songs constitute a "fair use" of the copyrighted material we use, and for which we give full credit to the original authors and composers. Second, we have found that, in the business of social or political satire, obtaining permissions from song publishers is, for all practical purposes, impossible.

5. On one occasion, the producers of a network television show, against our advice, tried to get publisher permission to perform seven of our songs. After much time and discussion, permission was denied in six of the seven cases.

6. Asking permission for such uses is interpreted by music publishers as, in effect, seeking their endorsement of the political ideas contained in our lyrics. Many copyrights are controlled by large corporations, such as Sony or Walt Disney, which have ongoing issues and relationships in Washington. These companies have no interest in endorsing barbed political satire directed at Members of Congress, the President, or even the federal judiciary. Nor do we wish to submit our lyrics to them for censorship. If we do not seek or obtain permission, then the ideas and lyrics of our songs—good or bad—are solely ours. And no one has claimed to be injured in the process; in our entire history, no one has ever sued us for copyright infringement.

7. We have frequently been contacted by other political parodists around the country who have described how they do not seek and can not obtain permission from music publishers for the use of copyrighted works for the reasons set forth in paragraph 4 and 6 above.

8. In our experience, song parodies cause no real or discernible harm to song publishers. People who book Capitol Steps shows, sit in our audiences, or buy our albums and tapes are interested in political satire, not in listening to melodies. We have never heard of anyone booking our show, or buying our albums, in lieu of booking performances or buying albums of the performers whose songs we parody. Similarly, it is impossible for me to imagine someone who would be dissuaded from buying the original version of "Oh, Pretty Woman" because he already owned the 2 Live Crew parody of that song.

9. I have carefully read the opinion issued by the Sixth Circuit Court of Appeals in this action. Unless this opinion is reconsidered, I would be personally quite fearful of having The Capitol Steps perform at any location within the Sixth Circuit, or of permitting our albums and tapes to be sold in those states. I am also fearful of having the group appear on national television or radio shows which are broadcast within that Circuit. Even more fundamentally, I am fearful that this opinion, unless reconsidered, would energize those who for whatever reason—including distaste for controversial ideas and opinions—may wish to quash song parodies as a popular form of political expression.

10. The Capitol Steps only learned that the Sixth Circuit had reversed the District Court's decision in the 2 Live Crew case on Tuesday, September 15, 1992, when we were informed of this fact by our attorney. I also learned at that time that 2 Live Crew had filed a Petition for Rehearing. Since we did not know before that date that a decision had been rendered, it was impossible for us to file a timely brief in support of the Petition for Rehearing under the Circuit's Local Rules. I do not believe that our filing a brief at this time would prejudice any party.

I make the foregoing declaration under penalty of perjury this 21 day of September, 1992.

/s/ William A. Strauss
WILLIAM A. STRAUSS

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
Cincinnati, Ohio

Case No. 91-6225

ACUFF-ROSE MUSIC, INC.,
Plaintiff-Appellant
v.

LUTHER R. CAMPBELL, *et al.*,
Defendants-Appellees

On appeal from a decision of the United States
District Court for the Middle District of Tennessee

DECLARATION OF ALISON K. RUSSELL

1. My name is Alison K. Russell. I am Vice President of MADAR, Inc., a Washington, D.C. corporation. I am also the paid, full-time business manager for the political satirist, Mark Russell. In addition, I am his wife, and in a unique position to comment on his career.

2. Mark Russell has been performing in the Washington, D.C. area and nationally for nearly 40 years. He regularly appears on national network radio and television. For the past 18 years, he has hosted his own "Mark Russell Comedy Specials" on public television. He has appeared on nearly every national news show. He is a regular contributor to "Good Morning America," and was a co-star of the NBC show "Real People."

3. Mark Russell also appears in concert around the country. In 1992 alone, he will perform nearly 130 shows in 30 states, including those of the Sixth Circuit. He has appeared before the American Bar Association, the National Association of Broadcasters, and the Federal Communications Commission. He has appeared before, and at the behest of nearly every President and Vice President since Lyndon Johnson. He has also appeared at events at the request of former Chief Justice Warren Burger, numerous members of Congress, presidential candidates, governors, and state representatives of both political parties.

4. Mark Russell traces his start in political satire to the suggestion of members of Congress and their staffs. In 1958, he was performing the works of others, including Tom Lehrer and Charlie Drew, in the Carroll Arms Hotel, in Washington. Since it was the closest bar to the Hill, it was where many congressmen and their staffs adjourned at the end of the day. It was here that he began singing and talking about the events in Congress. As he wrote in the introduction to his book *Presenting Mark Russell* (Everest House Publishers, 1981), "my act is basically the same as it has been since 1961; only the names, as they say, have been changed to protect the retired and deceased."

5. Along with spoken material, Mark Russell performs song parodies, to both copyrighted and original melodies. A current parody of a copyrighted work is "We're Just Wild About Harry" to the tune of "I'm Just Wild About Harry," which is a satirical look at how Governor Clinton and President Bush are invoking the name of Harry Truman. Another is "The Quest," a song about Ross Perot to the tune of "The Impossible Dream."

6. Mark Russell does not seek or obtain license from copyright owners for several reasons. First, he has been advised that his use of copyrighted songs constitutes "fair use" of the copyrighted materials. Second, the very na-

ture of social and political satire makes it impossible to obtain timely permission. When, for instance, it is announced that the Pentagon is spending $600 for the purchase of a screwdriver, it is not possible to wait more than the few hours necessary to write and memorize "Wrench for Sale," to the tune of "Love for Sale." When the video tape of the Rodney King beating became known, it was not possible to wait more than the few hours necessary to write and memorize "On the Streets of LA" to the tune of "On the Street Where You Live."

7. It is not possible to wait for permission because at 7 or 8 p.m. on a Friday evening there is no way to get in touch with someone who might be able to get in touch with someone from whom permission might be obtained; the story may not last more than one day—in which case the exercise of getting permission would be moot; and because audiences have come to expect comment in song on the topic of the day from Mark Russell. To wait for permission means to disappoint the audience—something a professional performer would try never to do.

8. Asking permission would also be interpreted by music publishers as a request for an endorsement of the political ideas contained within the lyrics. Since the political views contained within a song are Mark Russell's, no endorsement is needed or wanted. In his nearly 40-year career, Mark Russell has never been sued for copyright infringement; nor has anyone ever claimed to be injured by what he has said or sung.

9. I see no real or discernable harm to song publishers from my husband's performances. People who book Mark Russell, or purchase a ticket to one of his concerts, or tune into his television show, do so because they want to hear what he is saying or singing about the current political scene. They are less interested in the song he parodies; other than perhaps some may get the intended pun. Rather, they are interested in what he is saying with his lyrics. On the other hand, through the use of

older, non-standard songs, I believe Mark Russell may have helped reintroduce tunes such as "Put on Your Old Grey Bonnet," whose copyright dates back to 1909, when he parodied it with his "AARP Fight Song." And I believe that the parodies may remind the audience that they always liked the original, and perhaps cause them to purchase it.

10. I have carefully read the opinion issued by the Sixth Circuit Court of Appeals in this action. I am grateful that Mark Russell has no concerts scheduled within the Sixth Circuit's jurisdiction between now and the end of the year. I am concerned that this opinion compromises future scheduled appearances within the Sixth Circuit's jurisdiction. I am also concerned that this opinion may cause those colleges and organizations within the Sixth Circuit's jurisdiction who have booked Mark Russell to consider cancelling their contracts rather than take the chance of becoming embroiled in a legal controversy.

11. I only learned about the Sixth Circuit opinion in this case last week, through a conversation with Bill Strauss of The Capitol Steps; prior to that time, I did not even know that an appeal was pending. I also learned last week that 2 Live Crew had filed a Petition for Rehearing. Since neither Mark Russell nor I knew before last week that a decision had been rendered, it was impossible for him to file a timely brief in support of the Petition for Rehearing under the Circuit's Local Rules. I do not believe that his filing a brief at this time would prejudice any party.

I make the foregoing declaration under penalty of perjury, this 20 day of September, 1992.

/s/ Alison K. Russell
ALISON K. RUSSELL

APPENDIX C

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1992

No. 92-1292

LUTHER R. CAMPBELL, a/k/a LUKE SKYYWALKER,
CHRISTOPHER WONGWON, a/k/a FRESH KID ICE,
MARK ROSS, a/k/a BROTHER MARQUIS,
DAVID HOBBS, a/k/a MR. MIXX;
professionally known as THE 2 LIVE CREW;
LUKE SKYYWALKER RECORDS,
Petitioners,

vs.

ACUFF-ROSE MUSIC, INC.,
Respondent.

DECLARATION OF WILLIAM A. STRAUSS

1. My name is William A. Strauss. I am an officer and director of Capital Steps Productions, Inc., and the full time artistic director and co-lyricist for "The Capitol Steps," the company's musical and theatrical troupe. On September 21, 1992, I executed a declaration which was attached as Appendix A to the *amicus* brief filed in this action by The Capitol Steps and Mark Russell before the Sixth Circuit Court of Appeals. On September 20, 1992, Allison K. Russell, Mark Russell's wife and business manager, executed a declaration which was filed as Appendix B to that brief. Copies of these declarations are attached as Appendices A and B, respectively, to the

amicus brief which Mark Russell and we are now filing with the Supreme Court in this matter.

2. I have also caused to be lodged with the Clerk of this Court, as Exhibit 1 to this declaration, a recording produced by The Capitol Steps entitled "From Yankee Doodle to Pander Bear: A History of American Musical Parody." The recording contains excerpts from 66 of our nation's most memorable and historically significant musical parodies. We produced the tape as a tribute to those who wrote and sang these songs, and as a teaching aid for teachers of American history in secondary schools and colleges. I personally researched, collated, and edited the sung and spoken material documented on this tape, and know it to be accurately based on reliable and verifiable historical sources. (I am familiar with such sources, having co-authored three books regarding American history, including *Generations: The History of America's Future*, William Morrow/Quill, 1991.)

I make the foregoing declaration under penalty of perjury, this 21st day of February, 1993.

/s/ William A. Strauss
WILLIAM A. STRAUSS